



DEPARTMENT OF LABOR

## **Employee Benefits Security Administration**

### **Exemptions from Certain Prohibited Transaction Restrictions**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grants of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: 2023-03, Blue Cross and Blue Shield Association, D-12077; 2023-04, Blue Cross and Blue Shield of Arizona, Inc., D-12035; 2023-05, Blue Cross and Blue Shield of Vermont, D-12055; 2023-06, Hawaii Medical Service Association, D-12038; 2023-07, BCS Financial Corporation, D-12036; 2023-08, Blue Cross and Blue Shield of Mississippi, D-12040; 2023-09, Blue Cross and Blue Shield of Nebraska, Inc., D-12041; 2023-10, BlueCross BlueShield of Tennessee, Inc., D-12045; 2023-11, Midlands Management Corporation 401(k) Plan, D-12031; 2023-12, DISH Network Corporation 401(k) Plan and the EchoStar 401(k) Plan, D-12012.

**SUPPLEMENTARY INFORMATION:** Notices were published in the *Federal Register* of the pendency before the Department of proposals to grant such exemptions. Each notice set forth a summary of the facts and representations made by the

applicant for the exemption and referred interested persons to the application for a complete statement of the facts and representations. Each application is available for public inspection at the Department in Washington, D.C. Each notice also invited interested persons to submit comments on the requested exemption to the Department. In addition, each notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). Each applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

Each notice of proposed exemption was issued, and each exemption is being granted, solely by the Department, because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

### **Statutory Findings**

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October

27, 2011) and based upon the entire record, the Department makes the following findings:

- (a) Each exemption is administratively feasible;
- (b) Each exemption is in the interests of the plan and its participants and beneficiaries; and
- (c) Each exemption is protective of the rights of the participants and beneficiaries of the plan.

**Blue Cross and Blue Shield Association  
Located in Chicago, Illinois**

**[Prohibited Transaction Exemption 2023-03;**

**Exemption Application No. D-12077]**

#### **Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>1</sup> permitting Blue Cross and Blue Shield Association (BCBSA) to make a series of payments to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield Association (the Plan), including: (1) the past payment of \$69,000,000, made on March 12, 2021; and (2) the past payment of \$13,500,000, made on March 28, 2022 (the Restorative Payments). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payments amount, plus reasonable attorneys' fees to BCBSA.

This exemption provides only the relief specified in

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<sup>1</sup> 87 FR 52118 (August 24, 2022).

the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

#### **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost \$183,368,144, or 77.82 percent of its assets. These losses caused the Plan to be underfunded.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under

ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>2</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBSA took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 24, 2020, BCBSA and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement). On June 22, 2022, BCBSA and the Plan amended the Contribution and Assignment Agreement to provide that BCBSA's Restorative Payments under the Agreement will consist of a \$69,000,000 payment made on March 12, 2021, and a \$13,500,000 payment made on March 28, 2022.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBSA.<sup>3</sup> Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the

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<sup>2</sup> Case number 20-CIV-07606.

<sup>3</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBSA that does not exceed the total Restorative Payments made by BCBSA, plus reasonable attorneys' fees paid by BCBSA on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBSA to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBSA do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBSA for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBSA under this exemption, the amount of reasonable attorneys' fees paid by BCBSA on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBSA in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. In response, the

Department received three written comments from Plan participants and no requests for a public hearing.

### **Comments from Plan Participants**

The first commenter stated that they do not agree that this exemption should be granted to BCBSA. They also stated that BCBSA has not been truthful in the past with how they have made changes to the Plan and the notice for this exemption was sent on the last possible day that BCBSA was required to provide notice.

The second commenter stated that they are against the Department granting this exemption to BCBSA because the Plan was frozen as of 12/31/2021, and, as a result, they are losing seven years of retirement income.

The third commenter stated that they supported the exemption with one caveat: BCBSA should be required to bear the cost of the Attorneys' Fees incurred in connection with the plan's legal claims without getting reimbursed for those fees by the plan. The third commenter stated:

"While Allianz clearly bears primary responsibility for this situation, I believe BCBSA also bears significant responsibility for having made the ill-advised decision to invest such a large proportion of plan assets in the Structured Alpha Funds... Notwithstanding the generally favorable outcome of this situation in the fullness of time, I believe it is appropriate as a matter of public policy for BCBSA to bear some financial consequences in

this matter.”

**Department’s Response:**

With respect to the first commenter, the Department encourages them to contact the Department at any time if they believe that they have not received the benefits to which they are entitled under the Plan. Regarding the issues raised in the comment, the Department notes that changes to the Plan made by BCBSA in the past are not material to the terms of this exemption. Regarding BCBSA’s requirement to provide notice within 15 calendar days of the proposed exemption’s publication date, the Department has no reason to believe that BCBSA did not meet this requirement.

With respect to the second commenter, the Department again encourages any participant to contact the Department if they believe they have not received all the benefits they are entitled to under the Plan. Regarding the substance of the comment, the Department notes that BCBS’s decision to freeze the Plan in 2021 does not affect or relate to this exemption.

With respect to the third commenter, the Department notes that in granting this exemption, the Department is explicitly not rendering judgment as to whether the Plan’s fiduciaries have met their general fiduciary responsibilities of prudence and loyalty as set forth under ERISA Section 404. Further, condition (b) of this



exemption expressly states, "[i]n connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against...: (1) any fiduciary of the Plan."

Regarding Attorneys' Fees, this exemption also has strict standards that limit BCBSA's receipt of such fees to reasonable legal expenses paid by BCBSA on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by the Independent Fiduciary who confirms that the fees were reasonably incurred and paid by BCBSA to unrelated third parties.

**Department's Additional Comment:**

The Department is amending the last sentence of Section (III)(c) of the exemption by replacing the word "minimize" with "avoid." The Department is making this revision to emphasize that the Repayment to BCBSA under this exemption should be carried out in a manner that avoids unnecessary costs and disruption to the Plan and Plan investments.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12077) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515,

U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022 at 87 FR 52118.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by BCBSA on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBSA to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBSA do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBSA for representation of BCBSA or the interests of any party other than the Plan.

(b) The term "BCBSA" means Blue Cross and Blue Shield Association.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement dated November 24, 2020, and

its amendment that became effective on June 22, 2022, containing all material terms regarding BCBSA's agreement to make Required Restorative Payments to the Plan in return for the Plan's potential Repayment to BCBSA of an amount that is not more than the lesser of the Required Restorative Payment Amount (as described in Section I(h)) or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBSA in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBSA and does not hold an ownership interest in BCBSA or affiliates of BCBSA;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries;<sup>4</sup>

(5) Has not received gross income from BCBSA or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBSA or from affiliates of BCBSA while serving as an Independent

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<sup>4</sup> 29 CFR 2509.75-4.

Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The "Plan" means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield Association.

(g) The term "Plan Losses" means the \$183,368,144 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payments" means the payments made by BCBSA to the Plan in connection with the Plan Losses, defined above, consisting of: (1) the past payment of \$69,000,000 on March 12, 2021; and (2) the past payment of \$13,500,000 on March 28, 2022. The sum of (1)-(2) is the Required Restorative Payment Amount.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to BCBSA following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective November 24, 2020, to the following transactions: BCBSA's transfer of Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBSA, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

## **SECTION III. CONDITIONS**

(a) The Plan received the entire Restorative Payment Amount no later than March 28, 2022;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBSA; and/or (4) any person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to BCBSA is not more than the lesser of the total Restorative Payments received by the

Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBSA may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBSA must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBSA for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBSA to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBSA for Attorneys' Fees. For purposes of determining the amount of Attorneys'



Fees the Plan may reimburse to BCBSA under this exemption, the amount of reasonable attorney fees paid by BCBSA on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBSA in connection with the Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent

Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBSA must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of November 24, 2020.

*For Further Information:* Contact Mr. Joseph Brennan of the Department, telephone (202) 693-8456. (This is not a toll-free number.)

**Blue Cross and Blue Shield of Arizona, Inc.  
Located in Phoenix, Arizona**

**[Prohibited Transaction Exemption 2023-04;  
Exemption Application No. D-12035]**

#### **Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>5</sup> permitting Blue Cross and Blue Shield of Arizona, Inc. (BCBS AZ) to

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<sup>5</sup> 87 FR 52130 (August 24, 2022).

make a series of payments to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Arizona, Inc. (the Plan), including: (1) past payments totaling \$130,000,000; and (2) future amounts necessary for (a) the Plan's assets to be equal to or greater than 100% of the Plan's current liabilities, and (b) the Plan to have an adjusted funding target attainment percentage (AFTAP) of 110% (the Restorative Payments). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payments amount, plus reasonable attorneys' fees to BCBS AZ.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

#### **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series

of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost \$302,470,379.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>6</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS AZ took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 5, 2020, BCBS AZ and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment

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<sup>6</sup> Case number 20-CIV-07606.

Agreement). Pursuant to the Contribution and Assignment Agreement, BCBS AZ agreed to make \$274 million in Restorative Payments to the Plan pursuant to an installment payment structure (the Restorative Payments). BCBS AZ made its first installment payment of \$60 million to the Plan on September 15, 2020. Thereafter, BCBS AZ made Restorative Payments to the Plan of \$35,000,000, on December 28, 2020, \$10,000,000, on July 31, 2021, and \$25,000,000 on December 21, 2021.

On October 13, 2021, BCBS AZ and the Plan amended the Restorative Payments provision of the Contribution and Assignment Agreement to state that, before December 31, 2023, BCBS AZ would contribute amounts necessary for the Plan to have: (a) an adjusted funding target attainment percentage of 110% (after taking into account any waivers of the funding standard carryover balance by the Plan Sponsor); and (b) an amount of assets that is at least 100% of current Plan liabilities. In addition, any minimum required contributions made by BCBS AZ to the Plan on or after October 13, 2021, will not be included as part of the Restorative Payments required under the Contribution and Assignment Agreement.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned

Interests) to BCBS AZ.<sup>7</sup> Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS AZ that does not exceed the total Restorative Payments made by BCBS AZ, plus reasonable attorneys' fees paid by BCBS AZ on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS AZ to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS AZ do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS AZ for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS AZ under this exemption, the amount of reasonable attorneys' fees paid by BCBS AZ on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS AZ in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

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<sup>7</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

## **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12035) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52130.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by BCBS AZ on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms

that the fees were reasonably incurred and paid by BCBS AZ to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS AZ do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBS AZ for representation of BCBS AZ or the interests of any party other than the Plan.

(b) The term "BCBS AZ" means Blue Cross and Blue Shield of Arizona, Inc.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement between BCBS AZ and the Plan, dated November 5, 2020, and its amendment that became effective on October 13, 2021, containing all material terms regarding BCBS AZ's agreement to make Required Restorative Payments to the Plan in return for the Plan's potential Repayment to BCBS AZ of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS AZ in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor



Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS AZ and does not hold an ownership interest in BCBS AZ or affiliates of BCBS AZ;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries;<sup>8</sup>

(5) Has not received gross income from BCBS AZ or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year.

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<sup>8</sup> 29 CFR 2509.75-4.

This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS AZ or from affiliates of BCBS AZ while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The "Plan" means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Arizona, Inc.

(g) The term "Plan Losses" means the \$302,470,379 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary

responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payments" means the payments made by BCBS AZ to the Plan in connection with the Plan Losses, defined above, consisting of: (1) a first installment amount of \$60,000,000 that BCBS AZ contributed to the Plan on September 15, 2020; (2) a second installment amount of \$35,000,000 that BCBS AZ contributed to the Plan on December 28, 2020; (3) a third installment amount of \$10,000,000 that BCBS AZ contributed to the Plan on July 30, 2021; (4) a fourth installment amount of \$25,000,000 that BCBS AZ contributed to the Plan on December 21, 2021; and (5) other amounts contributed to the Plan by BCBS AZ before December 31, 2023 that are necessary for (i) the Plan to have an adjusted funding target attainment percentage of 110% after taking into account any waivers of the funding standard carryover balance by the Plan Sponsor, and (ii) the Plan's assets to be equal to or greater than 100% of the current liabilities of the Plan. The sum of (1)-(5) is the Required Restorative Payment Amount. The term "Required Restorative Payment" will not include any required minimum contributions that BCBS AZ makes to the Plan on and after October 13, 2021.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to BCBS AZ following the Plan's receipt of proceeds from the Claims, where the Repayment is

made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 15, 2020, to the following transactions: BCBS AZ's transfer of Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBS AZ, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

## **SECTION III. CONDITIONS**

(a) The Plan received the entire Restorative Payment Amount no later than December 31, 2023;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS AZ; and/or (4) any

person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to BCBS AZ is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS AZ may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS AZ must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution

and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS AZ for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS AZ to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS AZ for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS AZ under this exemption, the amount of reasonable attorney fees paid by BCBS AZ on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS AZ in connection with the Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a

successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS AZ must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of September 15, 2020.

*For Further Information:* Contact Mr. Frank Gonzalez of the Department, telephone (202) 693-8553. (This is not a toll-free number.)

**Blue Cross and Blue Shield of Vermont**

**Located in Berlin, Vermont**

**[Prohibited Transaction Exemption 2023-05;**

**Exemption Application No. D-12055]**



### **Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>9</sup> permitting Blue Cross and Blue Shield of Vermont (BCBS VT) to make a series of payments to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Vermont (the Plan) over a four-year period (the Restorative Payments). The Restorative Payments will return the Plan to at least the Plan's funding level (126.61%) as of January 1, 2019. If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS VT.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

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<sup>9</sup> 87 FR 52135 (August 24, 2022).

## **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost \$41,588,205.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>10</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS VT took steps to protect Plan benefits

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<sup>10</sup> Case number 20-CIV-07606.

and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on December 21, 2020, BCBS VT and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement).

In the Contribution and Assignment Agreement, BCBS VT agreed to make an initial \$13,000,000 lump sum payment to the Plan which was expected to restore the Plan to an AFTAP funding level of approximately 80% as of the January 1, 2021 valuation of the Plan. BCBS VT also agreed to make such additional payments to the Plan as necessary to maintain the Plan's funding level at 80% as of such date, to the extent the preliminary \$13,000,000 installment payment fails to do so. Finally, BCBS VT stated that it intended to make subsequent installment payments to the Plan on at least an annual basis and over a four-year period to restore Plan funding to approximately the level that was reported prior to the losses sustained within the Allianz Structured Alpha strategy.

Since the effective date of the Contribution and Assignment Agreement, BCBS VT has made two Restorative Payments to the Plan: a \$13,000,000 payment remitted on December 23, 2020, and a \$3,100,000 payment remitted on September 14, 2021.

This exemption requires BCBS VT to make the

Restorative Payments necessary to bring the Plan's funding percentage to at least its January 1, 2019, pre-loss funded percentage of 126.61%, by December 31, 2024. The prior restorative payments noted together with the funding obligations noted here constitute the Required Restorative Payments under this exemption.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS VT.<sup>11</sup> Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS VT that does not exceed the total Restorative Payments made by BCBS VT, plus reasonable attorneys' fees paid by BCBS VT on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS VT to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS VT do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS VT for

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<sup>11</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS VT under this exemption, the amount of reasonable attorneys' fees paid by BCBS VT on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS VT in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12055) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's

decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52135.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by BCBS VT on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS VT to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS VT do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBS VT for representation of BCBS VT or the interests of any party other than the Plan.

(b) The term "BCBS VT" means Blue Cross and Blue Shield of Vermont.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement between BCBS VT and the Plan, dated December 21, 2020, containing all material terms regarding BCBS VT's agreement to make Restorative Payments

(as described in Section I(h)) to the Plan in return for the Plan's potential Repayment to BCBS VT of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS VT in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS VT and does not hold an ownership interest in BCBS VT or affiliates of BCBS VT;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries;<sup>12</sup>

(5) Has not received gross income from BCBS VT or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS VT or from affiliates of BCBS VT while serving as an Independent

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<sup>12</sup> 29 CFR 2509.75-4.



Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The "Plan" means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Vermont, Inc.

(g) The term "Plan Losses" means the \$41,588,205 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payments" means the payments made by BCBS VT to the Plan in connection with the Plan Losses, defined above, including: (1) the past payment of \$13,000,000 made on December 23, 2020, (2) the past payment of \$3,100,000 made on September 14, 2021, and (3) amounts necessary to restore the Plan to its funding level of 126.91% before December 31, 2024. The sum of (1)-(3) is the Required Restorative Payment Amount.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to BCBS VT following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the

Claims, and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCBS VT's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBS VT, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

## **SECTION III. CONDITIONS**

(a) The Plan receives the entire Restorative Payment Amount no later than December 31, 2024;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS VT; and/or (4) any

person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to BCBS VT is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS VT may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS VT must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution

and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS VT for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS VT to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS VT for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS VT under this exemption, the amount of reasonable attorney fees paid by BCBS VT on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS VT in connection with the Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a

successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS VT must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of December 21, 2020.

*For Further Information:* Contact Mr. Nicholas Schroth of the Department, telephone (202) 693-8571. (This is not a toll-free number.)

**Hawaii Medical Service Association**

**Located in Honolulu, Hawaii**

**[Prohibited Transaction Exemption 2023-06;**

**Exemption Application No. D-12038]**

**Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>13</sup> permitting the past restorative payment of \$50,000,000 (the Restorative Payment) by Hawaii Medical Service Association (HMSA) to the Non-Contributory Retirement Program for Certain Employees of Hawaii Medical Service Association (the Plan). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to HMSA.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have

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<sup>13</sup> 87 FR 52141 (August 24, 2022).

granted this exemption.

## **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost \$187,271,581.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>14</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through

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<sup>14</sup> Case number 20-CIV-07606.



the litigation, HMSA took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 3, 2020, HMSA and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement) whereby HMSA agreed to make a \$50,000,000 Restorative Payment to the Plan. Subsequently, on December 18, 2020, HMSA made a \$50,000,000 Restorative Payment to the Plan. This \$50,000,000 payment is the Required Restorative Payment Amount under this exemption.

In exchange for the Restorative Payment, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to HMSA.<sup>15</sup> Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to HMSA that does not exceed the total Restorative Payment made by HMSA, plus reasonable attorneys' fees paid by HMSA on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and

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<sup>15</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

paid by HMSA to unrelated third parties (the Attorneys' Fees) .

For the purposes of this exemption, Attorneys' Fees reimbursable to HMSA do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by HMSA for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to HMSA under this exemption, the amount of reasonable attorneys' fees paid by HMSA on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by HMSA in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award) .

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12038) is available

for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52141.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by HMSA on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by HMSA to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to HMSA do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by HMSA for representation of HMSA or the interests of any party other than the Plan.

(b) The term "HMSA" means Hawaii Medical Service Association.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon

Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement between HMSA and the Plan, dated November 3, 2020, containing all material terms regarding HMSA's agreement to make a \$50,000,000 payment to the Plan in return for the Plan's potential Repayment to HMSA of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by HMSA in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of HMSA and does not hold an ownership interest in HMSA or affiliates of HMSA;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding

any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries;<sup>16</sup>

(5) Has not received gross income from HMSA or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any

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<sup>16</sup> 29 CFR 2509.75-4.

property to, or borrow any funds from HMSA or from affiliates of HMSA while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The "Plan" means the Non-Contributory Retirement Program for Certain Employees of Hawaii Medical Service Association.

(g) The term "Plan Losses" means the \$187,271,581 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payment" means the payments made by HMSA to the Plan in connection with the Plan Losses, defined above, consisting of a \$50,000,000 payment that HMSA contributed to the Plan on December 18, 2020. This \$50,000,000 payment is the Required Restorative Payment Amount.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to HMSA following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims,

and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective November 3, 2020, to the following transactions: HMSA's transfer of the Restorative Payment to the Plan; and, in return, the Plan's Repayment of an amount to HMSA, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

## **SECTION III. CONDITIONS**

(a) The Plan received the entire Restorative Payment Amount on December 18, 2020;

(b) In connection with its receipt of the Required Restorative Payment, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) HMSA; and/or (4) any

person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to HMSA is not more than the lesser of the total Restorative Payment received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to HMSA may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to HMSA must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payment and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payment, the Repayment, and the terms of the Contribution and



Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to HMSA for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by HMSA to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payment;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payment;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payment. However, if first approved by the Independent Fiduciary, the Plan may reimburse HMSA for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to HMSA under this exemption, the amount of reasonable attorney fees paid by HMSA on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by HMSA in connection with the Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a

successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, HMSA must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of November 3, 2020.

*For Further Information:* Contact Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693-8567. (This is not a toll-free number.)

**BCS Financial Corporation**

**Located in Oakbrook Terrace, Illinois**

**[Prohibited Transaction Exemption 2023-07;**

**Application No. D-12036]**

### **Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>17</sup> permitting BCS Financial Corporation (BCS) to make a series of payments to the Non-Contributory Retirement Program for Certain Employees of BCS Financial Corporation (the Plan), including: (a) past payments totaling \$19,600,000; and (b) a payment of \$1,800,000 on or before September 13, 2023 (the Restorative Payments). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCS.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent

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<sup>17</sup> 87 FR 52146 (August 24, 2022).

these or similar conditions, the Department would not have granted this exemption.

### **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost \$29,496,983.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>18</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

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<sup>18</sup> Case number 20-CIV-07606.

Rather than wait for the Claims to be resolved through the litigation, BCS took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on October 9, 2020, BCS and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement). Pursuant to the Contribution and Assignment Agreement, BCS agreed to make a \$16,000,000 Restorative Payment to the Plan within seven business days after the Agreement's effective date. Subsequently, on October 13, 2020, BCS made a \$16,000,000 Restorative Payment to the Plan.

On September 27, 2021, BCS and the Plan amended the Restorative Payments provision of the Contribution and Assignment Agreement. Pursuant to the amendment, BCS agreed to make the following three additional Restorative Payments to the Plan: (a) a payment of \$1,800,000 on or before September 13, 2021; (b) a payment of \$1,800,000 on or before September 13, 2022; and (c) a payment of \$1,800,000 on or before September 13, 2023. Since the effective date of the Restorative Payment Amendment, BCS Financial has made two additional Restorative Payments to the Plan: a \$1,800,000 payment on September 14, 2021, and a \$1,800,000 payment on January 14, 2022.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or

settlement proceeds recovered from the Claims (the Assigned Interests) to BCS.<sup>19</sup> Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCS that does not exceed the total Restorative Payments made by BCS, plus reasonable attorneys' fees paid by BCS on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCS to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCS do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCS for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCS under this exemption, the amount of reasonable attorneys' fees paid by BCS on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCS in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a

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<sup>19</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

court award).

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12036) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52146.

#### **EXEMPTION**

##### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by BCS on behalf of the Plan in connection



with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCS to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCS do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCS for representation of BCS or the interests of any party other than the Plan.

(b) The term "BCS" means BCS Financial Corporation.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement between BCS and the Plan, dated October 9, 2020, and its amendment that became effective on September 27, 2021, containing all material terms regarding BCS's agreement to make Restorative Payments (as described in Section I(h)) to the Plan in return for the Plan's potential Repayment to BCS of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCS in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCS and does not hold an ownership interest in BCS or affiliates of BCS;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries;<sup>20</sup>

(5) Has not received gross income from BCS or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross

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<sup>20</sup> 29 CFR 2509.75-4.

income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCS or from affiliates of BCS while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The "Plan" means the Non-Contributory Retirement Program for Certain Employees of BCS Financial Corporation.

(g) The term "Plan Losses" means the \$29,496,983 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary

responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payments" means the payments made by BCS to the Plan in connection with the Plan Losses, defined above, including: (1) the past payment of \$16,000,000, made on October 13, 2020; (2) the past payment of \$1,800,000, made on September 14, 2021; (3) the past payment of \$1,800,000 made on January 14, 2022; and (4) a payment of \$1,800,000 to be made on or before September 13, 2023. The sum of (1)-(4) is the Required Restorative Payment Amount.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to BCS following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCS's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCS, which must be no more than the lesser of the Restorative Payment

Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

**SECTION III. CONDITIONS**

(a) The Plan receives the entire Restorative Payment Amount no later than September 13, 2023;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCS; and/or (4) any person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to BCS is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCS may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCS must be

carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCS for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCS to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCS for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCS under this exemption, the amount of reasonable attorney fees paid by BCS on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCS in connection with the Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCS must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material



information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of October 9, 2020.

*For Further Information:* Contact Mr. Frank Gonzalez of the Department, telephone (202) 693-8553. (This is not a toll-free number.)

**Blue Cross and Blue Shield of Mississippi, A Mutual  
Insurance Company  
Located in Flowood, Mississippi  
[Prohibited Transaction Exemption 2023-08;  
Application No. D-12040]**

**Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>21</sup> permitting the past payments of \$70,000,000 and \$12,000,000 (the Restorative Payments) by the Plan sponsor, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company (BCBS MS), to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Mississippi (the Plan). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS MS.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department

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<sup>21</sup> 87 FR 52152 (August 24, 2022).

to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

### **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost \$102,446,155.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>22</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could

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<sup>22</sup> Case number 20-CIV-07606.

take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS MS took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on September 17, 2020, BCBS MS and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement).

Pursuant to the Contribution and Assignment Agreement, BCBS MS agreed to make the following Restorative Payments to the Plan: (a) a \$70,000,000 payment within seven business days of the effective date of the Contribution and Assignment Agreement; and (b) a \$12,000,000 payment on or about November 24, 2020. BCBS MS subsequently made the following Restorative Payments to the Plan: (a) a payment of \$70,000,000 on September 21, 2020; and (b) a payment of \$12,000,000 on November 25, 2020.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS MS.<sup>23</sup> Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the

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<sup>23</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS MS that does not exceed the total Restorative Payments made by BCBS MS, plus reasonable attorneys' fees paid by BCBS MS on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS MS to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS MS do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS MS for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS MS under this exemption, the amount of reasonable attorneys' fees paid by BCBS MS on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS MS in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of

proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12040) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52152.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by BCBS MS on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS MS to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS MS do not include: (1) legal expenses paid by the Plan; and (2)

legal expenses paid by BCBS MS for representation of BCBS MS or the interests of any party other than the Plan.

(b) The term "BCBS MS" means Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement between BCBS MS and the Plan, dated September 17, 2020, containing all material terms regarding BCBS MS's agreement to make (a) a \$70,000,000 payment within seven business days of the effective date of the Contribution and Assignment Agreement and (b) a \$12,000,000 payment on or about November 24, 2020, in return for the Plan's potential Repayment to BCBS MS of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS MS in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the

successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS MS and does not hold an ownership interest in BCBS MS or affiliates of BCBS MS;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries;<sup>24</sup>

(5) Has not received gross income from BCBS MS or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation

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<sup>24</sup> 29 CFR 2509.75-4.



of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS MS or from affiliates of BCBS MS while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The "Plan" means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Mississippi.

(g) The term "Plan Losses" means the \$102,446,155 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary

responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payments" means the payments made by BCBS MS to the Plan in connection with the Plan Losses, defined above, consisting of (1) a payment of \$70,000,000 on September 21, 2020; and (2) a payment of \$12,000,000 on November 25, 2020. The sum of (1) and (2) is the Required Restorative Payment Amount.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to BCBS MS following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCBS MS's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to BCBS MS, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys'

Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

**SECTION III. CONDITIONS**

(a) The Plan received the entire Restorative Payment Amount by November 25, 2020;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS MS; and/or (4) any person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to BCBS MS is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS MS may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS MS must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS MS for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS MS to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS MS for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS MS under this exemption, the amount of reasonable attorney fees paid by BCBS MS on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS MS in connection with the Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS MS must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of September 17, 2020.

*For Further Information:* Contact Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693-8567. (This is not a toll-free number.)

**Blue Cross and Blue Shield of Nebraska, Inc.**

**Located in Omaha, Nebraska**

**[Prohibited Transaction Exemption 2023-09;**

**Application No. D-12041]**

### **Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>25</sup> permitting the past payments of \$7,000,000 and \$6,600,000 (the Restorative Payments) by the Plan sponsor, Blue Cross and Blue Shield of Nebraska, Inc. (BCBS Nebraska), to the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Nebraska, Inc. (the Plan). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS Nebraska.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent

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<sup>25</sup> 87 FR 52157 (August 24, 2022).



these or similar conditions, the Department would not have granted this exemption.

### **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and the Plan lost \$33,649,481.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>26</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

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<sup>26</sup> Case number 20-CIV-07606.

Rather than wait for the Claims to be resolved through the litigation, BCBS Nebraska took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on November 5, 2020, BCBS Nebraska and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement). Pursuant to the Contribution and Assignment Agreement, BCBS Nebraska agreed to make Restorative Payments to the Plan not in excess of \$33,649,481 by September 15, 2022. Subsequently, on August 25, 2021, BCBS Nebraska made a \$7,000,000 Restorative Payment to the Plan.

On March 17, 2022, BCBS Nebraska and the Plan amended the Restorative Payments provision of the Contribution and Assignment Agreement to require BCBS Nebraska to make one additional Restorative Payment of \$6,600,000 to the Plan by September 15, 2022. Subsequently, on March 29, 2022, BCBS Nebraska made a \$6,600,000 Restorative Payment to the Plan.

In exchange for the Restorative Payments, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS Nebraska.<sup>27</sup> Pursuant to the assignment,

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<sup>27</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.

if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS Nebraska that does not exceed the total Restorative Payments made by BCBS Nebraska, plus reasonable attorneys' fees paid by BCBS Nebraska on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Nebraska to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS Nebraska do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS Nebraska for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Nebraska under this exemption, the amount of reasonable attorneys' fees paid by BCBS Nebraska on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS Nebraska in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all

interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12041) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52157.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by BCBS Nebraska on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Nebraska to unrelated third parties. For the purposes of

this exemption, the Attorneys' Fees reimbursable to BCBS Nebraska do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBS Nebraska for representation of BCBS Nebraska or the interests of any party other than the Plan.

(b) The term "BCBS Nebraska" means Blue Cross and Blue Shield of Nebraska, Inc.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement between BCBS Nebraska and the Plan, dated November 5, 2020, and its amendment that became effective on March 17, 2022, containing all material terms regarding BCBS Nebraska's agreement to make (a) a payment not in excess of \$33,649,481 by September 15, 2022, and (b) a payment of \$6,600,000 by September 15, 2022, in return for the Plan's potential Repayment to BCBS Nebraska of an amount that is not more than lesser of the Required Restorative Payment Amount (as described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS Nebraska in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS Nebraska and does not hold an ownership interest in BCBS Nebraska or affiliates of BCBS Nebraska;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries;<sup>28</sup>

(5) Has not received gross income from BCBS Nebraska or its affiliates during any fiscal year in an

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<sup>28</sup> 29 CFR 2509.75-4.

amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS Nebraska or from affiliates of BCBS Nebraska while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

(f) The "Plan" means the Non-Contributory Retirement Program for Certain Employees of Blue Cross and Blue Shield of Nebraska, Inc.

(g) The term "Plan Losses" means the \$33,649,481 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payments" means the payments made by BCBS Nebraska to the Plan in connection with the Plan Losses, defined above, consisting of (1) a payment of \$7,000,000 on August 25, 2021; and (2) a payment of \$6,600,000 on March 29, 2022. The sum of (1) and (2) is the Required Restorative Payment Amount.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to BCBS Nebraska following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective September 17, 2020, to the following transactions: BCBS Nebraska's transfer of the Restorative Payments to the Plan; and, in return, the Plan's Repayment of an amount to



BCBS Nebraska, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

**SECTION III. CONDITIONS**

(a) The Plan received the entire Restorative Payment Amount by March 29, 2022;

(b) In connection with its receipt of the Required Restorative Payments, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS Nebraska; and/or (4) any person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to BCBS Nebraska is not more than the lesser of the total Restorative Payments received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS Nebraska may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received

all the litigation proceeds it is due. The Plan's Repayment to BCBS Nebraska must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payments and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payments, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS Nebraska for legal expenses in connection with the Claims

is limited to only reasonable legal expenses that were paid by BCBS Nebraska to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payments;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payments;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payments. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS Nebraska for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Nebraska under this exemption, the amount of reasonable attorney fees paid by BCBS Nebraska on behalf of the Plan in connection with the Claims must be reduced by the amount of legal fees received by BCBS Nebraska in connection with the

Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent Fiduciary, BCBS Nebraska must notify the Department's

Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of November 5, 2020.

*For Further Information:* Contact Ms. Anna Vaughan of the Department, telephone (202) 693-8565. (This is not a toll-free number.)

**BlueCross BlueShield of Tennessee, Inc.**

**Located in Chattanooga, Tennessee**

**[Prohibited Transaction Exemption 2023-10;**

**Application No. D-12045]**

### **Exemption**

On August 24, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>29</sup> permitting the past restorative payment of \$100,000,000 to the BlueCross BlueShield of Tennessee, Inc. Pension Plan (the Plan) Plan by the Plan sponsor, BlueCross BlueShield of

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<sup>29</sup> 87 FR 52163 (August 24, 2022).

Tennessee, Inc. (BCBS Tennessee). If the Plan receives litigation proceeds from the Claims, the Plan must transfer the lesser of the litigation proceeds received or the Restorative Payment amount, plus reasonable attorneys' fees to BCBS Tennessee.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

#### **BACKGROUND**

As discussed in further detail in the notice of proposed exemption, in March 2020 the Plan sustained significant asset losses through its investment in a series of Structured Alpha Funds managed by AGI US. These investment losses were caused, in significant part, by a fraudulent risk misrepresentation and forgery scheme carried out by three fund managers within AGI US. In March 2020, when equity markets declined sharply and volatility spiked, AGI US's promised risk protections were absent, and

the Plan lost \$93,576,015.

On September 16, 2020, the Blue Cross and Blue Shield Association National Employee Benefits Committee (the Committee) filed a cause of action in the United States District Court for the Southern District of New York against AGI US and Aon for Breach of Fiduciary Duty under ERISA Section 404, Breach of Co-Fiduciary Duty under ERISA Section 405, violation of ERISA Section 406(b) for the self-interested management of Plan assets, and breach of contract (the Claims).<sup>30</sup> At the time of filing, the Applicant anticipated that a resolution of the Claims could take an extended period of time.

Rather than wait for the Claims to be resolved through the litigation, BCBS Tennessee took steps to protect Plan benefits and avoid onerous benefit restrictions under Code section 436 that could result from a funding shortfall while the litigation was proceeding. Therefore, on October 8, 2020, BCBS Tennessee and the Plan entered into a Contribution and Assignment Agreement (the Contribution and Assignment Agreement), whereby BCBS Tennessee agreed to make a \$100,000,000 payment to the Plan within seven business days of the effective date of the Contribution and Assignment Agreement. This \$100,0000 payment is the Required Restorative Payment Amount under this exemption. BCBS Tennessee remitted \$100,000,000 to the Plan on October

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<sup>30</sup> Case number 20-CIV-07606.

8, 2020.

In exchange for the Restorative Payment, the Plan assigned its right to retain certain litigation and/or settlement proceeds recovered from the Claims (the Assigned Interests) to BCBS Tennessee.<sup>31</sup> Pursuant to the assignment, if the Plan receives litigation proceeds from the Claims when the AGI US/Aon litigation is resolved, the Plan will transfer a repayment (the Repayment) to BCBS Tennessee that does not exceed the total Restorative Payment made by BCBS Tennessee, plus reasonable attorneys' fees paid by BCBS Tennessee on behalf of the Plan in connection with the Claims. The attorneys' fees must be reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Tennessee to unrelated third parties (the Attorneys' Fees).

For the purposes of this exemption, Attorneys' Fees reimbursable to BCBS Tennessee do not include: (1) legal expenses paid by the Plan; or (2) legal expenses paid by BCBS Tennessee for representation of its own interests or the interests of any party other than the Plan. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Tennessee under this exemption, the amount of reasonable attorneys' fees paid by BCBS

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<sup>31</sup> Under the Contribution and Assignment Agreement, if the Plan receives litigation or settlement proceeds from the Claims, the proceeds would first flow to the Trust, and then each Plan's pro rata portion of the proceeds would be deposited into the individual trust funding that Plan.



Tennessee on behalf of the Plan in connection with the Claims must be reduced by the amount of attorneys' fees received by BCBS Tennessee in connection with the Claims from any non-Plan party (for example, from a third party pursuant to a court award).

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption by October 11, 2022. The Department received no comments or requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption.

The complete application file (D-12045) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on August 24, 2022. at 87 FR 52163.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Attorneys' Fees" means reasonable legal expenses paid by BCBS Tennessee on behalf of the Plan in connection with the Claims, if such fees are reviewed and approved by a qualified independent fiduciary who confirms that the fees were reasonably incurred and paid by BCBS Tennessee to unrelated third parties. For the purposes of this exemption, the Attorneys' Fees reimbursable to BCBS Tennessee do not include: (1) legal expenses paid by the Plan; and (2) legal expenses paid by BCBS Tennessee for representation of BCBS Tennessee or the interests of any party other than the Plan.

(b) The term "BCBS Tennessee" means BlueCross BlueShield of Tennessee, Inc.

(c) The term "Claims" means the legal claims against Allianz Global Investors U.S. LLC (AGI US) and Aon Investments USA Inc. (Aon), to recover certain losses incurred by the Plan in the first quarter of 2020.

(d) The term "Contribution and Assignment Agreement" means the written agreement between BCBS Tennessee and the Plan, dated October 8, 2020, containing all material terms regarding BCBS Tennessee's agreement to make a \$100,000,000 payment to the Plan in return for the Plan's potential Repayment to BCBS Tennessee of an amount that is not more than lesser of the Required Restorative Payment Amount (as

described in Section I(h)) already received or the amount of litigation proceeds the Plan receives from the Claims, plus reasonable Attorneys' Fees paid to unrelated third parties by BCBS Tennessee in connection with the Claims.

(e) The term "Independent Fiduciary" means Gallagher Fiduciary Advisors, LLC (Gallagher) or a successor Independent Fiduciary to the extent Gallagher or the successor Independent Fiduciary continues to serve in such capacity who:

(1) Is not an affiliate of BCBS Tennessee and does not hold an ownership interest in BCBS Tennessee or affiliates of BCBS Tennessee;

(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's

regulation relating to indemnification of fiduciaries;<sup>32</sup>

(5) Has not received gross income from BCBS Tennessee or its affiliates during any fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from BCBS Tennessee or from affiliates of BCBS Tennessee while serving as an Independent Fiduciary. This prohibition will continue for six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as an Independent Fiduciary.

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<sup>32</sup> 29 CFR 2509.75-4.

(f) The "Plan" means the BlueCross BlueShield of Tennessee, Inc. Pension Plan.

(g) The term "Plan Losses" means the \$93,576,015 in Plan losses the BCBSA's National Employee Benefits Committee alleges were the result of breaches of fiduciary responsibilities and breaches of contract by Allianz Global Investors U.S. LLC and/or Aon Investments USA Inc.

(h) The term "Restorative Payment" means the payments made by BCBS Tennessee to the Plan in connection with the Plan Losses, defined above, consisting of a \$100,000,000 payment that BCBS Tennessee contributed to the Plan on October 8, 2020. This \$100,000,000 payment is the Required Restorative Payment Amount.

(i) The "Repayment" means the payment, if any, that the Plan will transfer to BCBS Tennessee following the Plan's receipt of proceeds from the Claims, where the Repayment is made following the full and complete resolution of the Claims, and in a manner that is consistent with the terms of the exemption.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A), (B) and (D) and the sanctions resulting from the application of Code Section 4975, by reason of Code Sections 4975(c)(1)(A), (B) and (D), shall not apply, effective October 8, 2020, to the following transactions: BCBS

Tennessee's transfer of the Restorative Payment to the Plan; and, in return, the Plan's Repayment of an amount to BCBS Tennessee, which must be no more than the lesser of the Restorative Payment Amount or the amount of litigation proceeds the Plan received from the Claims, plus reasonable Attorneys' Fees, provided that the Definitions set forth in Section I and the Conditions set forth in Section III are met.

**SECTION III. CONDITIONS**

(a) The Plan received the entire Restorative Payment Amount by October 8, 2020;

(b) In connection with its receipt of the Required Restorative Payment, the Plan does not release any claims, demands and/or causes of action the Plan may have against the following: (1) any fiduciary of the Plan; (2) any fiduciary of the Blue Cross and Blue Shield National Retirement Trust (the Trust); (3) BCBS Tennessee; and/or (4) any person or entity related to a person or entity identified in (1)-(3) of this paragraph;

(c) The Plan's Repayment to BCBS Tennessee is not more than the lesser of the total Restorative Payment received by the Plan or the amount of litigation proceeds the Plan receives from the Claims. The Plan's Repayment to BCBS Tennessee may only occur after a qualified independent fiduciary (the Independent Fiduciary, as further defined in Section II(e)) has determined that: all the conditions of

the exemption are met; the Plan has received all the Restorative Payments it is due; and the Plan has received all the litigation proceeds it is due. The Plan's Repayment to BCBS Tennessee must be carried out in a manner designed to avoid unnecessary costs and disruption to the Plan and Plan investments;

(d) The Independent Fiduciary, acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B), must:

(1) Have reviewed, negotiated, and approved the terms and conditions of the Restorative Payment and the Repayment under the Contribution and Assignment Agreement, all of which must be in writing, before the Plan entered into those transactions/agreement;

(2) Have determined that the Restorative Payment, the Repayment, and the terms of the Contribution and Assignment Agreement, are prudent and in the interests of the Plan and its participants and beneficiaries;

(3) Confirm that the Required Restorative Payment Amount was fully and timely made;

(4) Monitor the litigation related to the Claims and confirm that the Plan receives its proper share of any litigation or settlement proceeds received by the Trust in a timely manner;

(5) Ensure that any Repayment by the Plan to BCBS Tennessee for legal expenses in connection with the Claims is limited to only reasonable legal expenses that were paid by BCBS Tennessee to unrelated third parties;

(6) Ensure that the conditions and definitions of this exemption are met;

(7) Submit a written report to the Department's Office of Exemption Determinations demonstrating and confirming that the terms and conditions of the exemption were met within 90 days after the Repayment; and

(8) Not enter into any agreement or instrument that violates ERISA Section 410 or the Department's Regulations codified at 29 CFR 2509.75-4.

(f) The Plan pays no interest in connection with the Restorative Payment;

(g) The Plan does not pledge any Plan assets to secure any portion of the Restorative Payment;

(h) The Plan does not incur any expenses, commissions, or transaction costs in connection with the Restorative Payment. However, if first approved by the Independent Fiduciary, the Plan may reimburse BCBS Tennessee for Attorneys' Fees. For purposes of determining the amount of Attorneys' Fees the Plan may reimburse to BCBS Tennessee under this exemption, the amount of reasonable attorney fees paid by BCBS Tennessee on behalf of the Plan in connection with the Claims must be reduced by the amount of



legal fees received by BCBS Tennessee in connection with the Claims from any non-Plan party (i.e., pursuant to a court award);

(i) The transactions do not involve any risk of loss to either the Plan or the Plan's participants and beneficiaries;

(j) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent Fiduciary in performing its duties to the Plan with respect to the transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation.

(k) If an Independent Fiduciary resigns, is removed, or for any reason is unable to serve as an Independent Fiduciary, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section II(e); and (2) otherwise meets the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible, including before the appointment of a successor Independent

Fiduciary, BCBS Tennessee must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information regarding the successor Independent Fiduciary, including the successor Independent Fiduciary's qualifications; and

(1) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate at all times.

*Effective Date:* This exemption is effective as of October 8, 2020.

*For Further Information:* Contact Ms. Blessed Chuksorji-Keefe of the Department, telephone (202) 693-8567. (This is not a toll-free number.)

**Midlands Management Corporation 401(k) Plan**

**Oklahoma City, OK**

**[Prohibited Transaction Exemption 2023-11;**

**Application No. D-12031]**

**Exemption**

On March 9, 2022, the Department published a notice of proposed exemption in the *Federal Register*<sup>33</sup> that would permit: (1) the December 18, 2018 Restorative payment of \$8,292,189 to the Plan by Safety National in exchange for the Plan's assignment to Midlands of the Assigned Interests; and (2) the potential additional cash payment(s) by Midlands to the Plan if the amount(s) Midlands receives from the Assigned Interests exceeds \$8,292,189, provided the conditions described in the proposal were met.

This exemption provides only the relief specified in the text of the exemption and does not provide relief from violations of any law other than the prohibited transaction provisions of ERISA expressly stated herein.

Accordingly, affected parties should be aware that the conditions incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

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<sup>33</sup> 87 FR 13315 (March 9, 2022).

## **BACKGROUND**

As discussed in further detail in the proposed exemption, beginning as early as 2013, and continuing through 2017, the Plan's former third party administrator, Vantage Benefit Administrators (Vantage), caused the unauthorized transfers of Plan assets directly to an account that Vantage used to operate its own business. Vantage caused 180 such unauthorized transfers that totaled in excess of \$5.5 million. Midlands Management Corporation (Midlands), the Plan sponsor, became aware of the unauthorized withdrawals on October 25, 2017 and engaged an unrelated party, Beasley & Company (Beasley), to investigate and assess associated Plan losses. Beasley ultimately found that the Plan's losses were \$9,292,189.<sup>34</sup>

The Plan and Midlands filed suit against Vantage and its principals, Jeffrey and Wendy Richie, and on March 18, 2018, obtained a \$10,170,452.00 final judgment. On April 19, 2018, an involuntary Chapter 7 bankruptcy petition was filed against Vantage. The Plan and Midlands have filed a creditor claim against the Vantage bankruptcy estate. The Plan has also received a \$1,000,000 insurance settlement payment in connection with the unauthorized transfers.<sup>35</sup>

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<sup>34</sup> Amount includes both principal amount and associated lost interest.

<sup>35</sup> This settlement payment came via the Plan's crime policy with Federal Insurance Company and was subsequently allocated to participant accounts and reported as "other contributions" in the Plan's statement of changes in net assets available for benefits for the year ended December 31, 2018.

In addition to the Claims against Vantage and the Richies, the Plan and Midlands filed Claims against Matrix Trust Company, the Plan's custodian, and RSM and Cole & Reed, P.C., the Plan's former auditors. Collectively, the claims against these parties, as well as against Vantage and the Richies are hereinafter referred to as the "Lawsuits." The Applicant estimates that it anticipates recovering up to \$4 million total, or approximately 49 percent of the Restorative Payment amount.

On December 18, 2018, Midlands was acquired by Safety National Casualty Corporation. In connection with the acquisition, Safety National made an \$8,292,189 restorative payment to the Plan to restore losses caused by the unauthorized withdrawals (the Restorative Payment). The Applicant represents that the Restorative Payment addresses the \$9,292,189 in aggregate losses incurred by the Plan, minus the \$1,000,000 settlement payment that the Plan received from Federal Insurance Company.

In exchange for the Restorative Payment, the Plan transferred the Assigned Interests to Midlands pursuant to a Recovery Rights Agreement. As discussed throughout the proposed exemption, the Assigned Interests represent the Plan's rights to receive proceeds from the Lawsuits.

On March 9, 2022, the Department proposed an exemption that would permit the Restorative Payment of \$8,292,189 to the Plan in exchange for the Plan's assignment to Midlands

of the Plan's right to proceeds from the Lawsuits and the potential additional cash payment(s) by Midlands to the Plan if the amount(s) Midlands recovers from the Assigned Interests exceeds \$8,292,189 (the Transactions). Absent an exemption, the Transactions would violate ERISA Sections 406(a)(1)(A) and (D).<sup>36</sup>

This exemption requires a prudently appointed and qualified independent fiduciary, Prudent Fiduciary Services, LLC (PFS), to protect and promote the interests of Plan participants and beneficiaries for all purposes with respect to the Transactions. This exemption also requires that, in entering into the Recovery Rights Agreement, the Plan did not release any claims, demands, and/or causes of action against any fiduciary of the Plan or Midlands, and that the Plan has not and will not incur any expenses or bear any costs in connection with the assignment of its rights under the Recovery Rights Agreement, the Lawsuits, or this exemption.

As required under this exemption, if Midlands recovers more than the \$8,292,189 Restorative Payment amount from the Assigned Interests, Midlands would be required to immediately transfer any such excess directly to the Plan.

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<sup>36</sup> ERISA Section 406(a)(1)(A) prohibits a plan fiduciary from causing the plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect sale or exchange of any property between the plan and a party-in-interest. ERISA Section 406(a)(1)(D) prohibits a plan fiduciary from causing a plan to engage in a transaction if the fiduciary knows or should know that the transaction constitutes a direct or an indirect transfer to, or use by or for the benefit of, a party-in-interest, of the income or assets of the plan.

Conversely, if Midlands recovers less than \$8,292,189 from the Assigned Interests, the Plan would not be required to repay any amount of the Restorative Payment back to Midlands, and Midlands would be solely responsible for all costs and expenses associated with pursuing the Assigned Interests.

With regard to this exemption, the Department finds that the favorable terms of the Transactions together with the protective conditions included therein are appropriately protective of, and in the interest of the Plan and its participants and beneficiaries. In this regard, the Department notes that the Restorative Payment immediately provided the Plan with \$8,292,189 in cash. If the Plan did not receive the immediate Restorative Payment, the individual account balances of Plan participants would have remained underfunded in the aggregate by \$8,292,189 until the Lawsuits were resolved.

#### **WRITTEN COMMENTS**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption. All comments and requests for a hearing were due to the Department by April 22, 2022. The Department received no written comments and did not receive any requests for a public hearing.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption described below.

The complete application file (D-12031) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, please refer to the notice of proposed exemption published on March 9, 2022, at 87 FR 13315.

## **EXEMPTION**

### **SECTION I. DEFINITIONS**

(a) The term "Assigned Interests" means the Plan's right to proceeds from the Lawsuits, which were transferred to Midlands in return for the Restorative Payment.

(b) The term "Independent Fiduciary" means Prudent Fiduciary Services, LLC (PFS), or a successor Independent Fiduciary, to the extent PFS or the successor Independent Fiduciary continues to serve in such capacity, and who:

(1) Is not an affiliate of Midlands and does not hold an ownership interest in Midlands or affiliates of Midlands;



(2) Was not a fiduciary with respect to the Plan before its appointment to serve as the Independent Fiduciary;

(3) Has acknowledged in writing that it:

(i) Is a fiduciary with respect to the Plan and has agreed not to participate in any decision regarding any transaction in which it has an interest that might affect its best judgment as a fiduciary; and

(ii) Has appropriate technical training or experience to perform the services contemplated by the exemption;

(4) Has not entered into any agreement or instrument that violates the prohibitions on exculpatory provisions in ERISA Section 410 or the Department's regulation relating to indemnification of fiduciaries at 29 CFR 2509.75-4;

(5) Has not received gross income from Midlands or affiliates of Midlands for that fiscal year in an amount that exceeds two percent (2%) of the Independent Fiduciary's gross income from all sources for the prior fiscal year. This provision also applies to a partnership or corporation of which the Independent Fiduciary is an officer, director, or 10 percent (10%) or more partner or shareholder, and includes as gross income amounts received as compensation for services provided as an independent

fiduciary under any prohibited transaction exemption granted by the Department; and

(6) No organization or individual that is an Independent Fiduciary, and no partnership or corporation of which such organization or individual is an officer, director, or ten percent (10%) or more partner or shareholder, may acquire any property from, sell any property to, or borrow any funds from Midlands or from affiliates of Midlands while serving as an Independent Fiduciary. This prohibition will continue for a period of six months after the party ceases to be an Independent Fiduciary and/or the Independent Fiduciary negotiates any transaction on behalf of the Plan during the period that the organization or individual serves as Independent Fiduciary.

(c) The term "Lawsuits" means the lawsuit filed by the Plan and Midlands against Vantage and its principals, Jeffrey and Wendy Richie in Case No.: 3:17-cv-03459, the bankruptcy claims filed against the Chapter 7 Estate of Vantage, and the claims filed against Matrix Trust, RSM, and Cole & Reed, for misrepresentation, breach of contract, breach of fiduciary duties, violations of state law, aiding and abetting, failure to supervise, and common law fraud.

(d) The term "Midlands" includes the following entities: (i) Midlands Management Corporation, (ii) the CAP Shareholders, and (iii) Cap Managers, LLC.

(e) The term "Recovery Rights Agreement" means the written agreement under which the Plan agreed to transfer its rights to the Assigned Interests in exchange for the Restorative Payment.

(f) The term "Restorative Payment" means the \$8,292,189 payment that was remitted to the Plan by Safety National as part of Safety National's acquisition of Midlands.

## **SECTION II. COVERED TRANSACTIONS**

The restrictions of ERISA Sections 406(a)(1)(A) and (D) shall not apply to: (1) the December 18, 2018 Restorative payment of \$8,292,189 to the Plan by Safety National in exchange for the Plan's assignment to Midlands of the Assigned Interests; and (2) the potential additional cash payment(s) by Midlands to the Plan if the amount(s) Midlands receives from the Assigned Interests exceeds \$8,292,189. In order to receive such relief, the conditions in Section III must be met in conformance with the definitions set forth in Section I.

## **SECTION III. CONDITIONS**

(a) The Restorative Payment and any Excess Recovery Amount payment, described below, are properly allocated to the Plan participants' accounts;

(b) If Midlands receives more than \$8,292,189 from the Assigned Interests, Midlands must immediately transfer to the Plan the Excess Recovery Amount, which is the difference between the amount of Assigned Interest proceeds and \$8,292,189. Midlands may reduce the Excess Recovery Amount (but not the Restorative Payment amount) paid to the Plan only by the amount of reasonable attorney's fees that Midlands incurred in pursuing the Assigned Interests if the fees were paid to unrelated third parties;

(c) If Midlands receives less than \$8,292,189 from the Assigned Interests, then Midlands must automatically forgive any unrecovered shortfall amount, with no Plan assets transferred to Midlands;

(d) In connection with its receipt of the Restorative Payment, the Plan has not and will not release any claims, demands and/or causes of action it may have against: (1) any fiduciary of the Plan; (2) Midlands; and/or (3) any person or entity related to a person or entity identified in (1)-(2) of this paragraph;

(e) A qualified independent fiduciary (the Independent Fiduciary) that is unrelated to Midlands and/or its affiliates and is acting solely on behalf of the Plan in full accordance with its obligations of prudence and loyalty under ERISA Sections 404(a)(1)(A) and (B):

(1) Reviewed the terms and conditions of the Restorative Payment and the Recovery Rights Agreement and the proposed and final exemptions;

(2) Determined that the Covered Transactions were prudent, in the interest of, and protective of the Plan and its participants and beneficiaries;

(3) Confirmed that the Restorative Payment amount was properly made to the Plan and appropriately allocated;

(4) Monitors the Plan's Assigned Interests on an ongoing basis to ensure that all recovery amounts due the Plan are immediately and properly remitted to the Plan, and appropriately allocated to participant accounts;

(5) Monitors and ensures that legal fees paid in connection with the Assigned Interests and the Lawsuits are limited to reasonable attorney's fees paid to unrelated third parties that Midlands incurred in pursuing recoveries from the Assigned Interests and the Lawsuits;

(6) Has not entered into any agreement or instrument that violates ERISA Section 410 or Department's Regulations codified at 29 CFR 2509.75-4;

(f) No party associated with this exemption has or will indemnify the Independent Fiduciary and the Independent Fiduciary will not request indemnification from any party associated with this exemption, in whole or in part, for negligence and/or any violation of state or federal law that may be attributable to the Independent

Fiduciary in performing its duties to the Plan with respect to the Proposed Transactions. In addition, no contract or instrument may purport to waive any liability under state or federal law for any such violation;

(g) Not later than 90 days after the resolution of Midlands' collection efforts with respect to the Assigned Interests, the Independent Fiduciary must submit a written statement to the Department confirming and demonstrating that all of the requirements of the exemption have been met;

(h) If an Independent Fiduciary resigns, is removed, or is unable to serve as an Independent Fiduciary for any reason, the Independent Fiduciary must be replaced by a successor entity that: (1) meets the definition of Independent Fiduciary detailed above in Section I(b); and (2) otherwise meets all of the qualification, independence, prudence and diligence requirements set forth in this exemption. Further, any such successor Independent Fiduciary must assume all of the duties of the outgoing Independent Fiduciary. As soon as possible before the appointment of a successor Independent Fiduciary, the Applicant must notify the Department's Office of Exemption Determinations of the change in Independent Fiduciary and such notification must contain all material information including the qualifications of the successor Independent Fiduciary;

(i) Neither the Independent Fiduciary, nor any parties related to the Independent Fiduciary, have performed any prior work on behalf of Midlands or any party related to Midlands;

(j) Neither the Independent Fiduciary, nor any parties related to the Independent Fiduciary, have any financial interest with respect to the Independent Fiduciary's work as Independent Fiduciary, apart from the express fees and reimbursement for reasonable expenses paid to the Independent Fiduciary to represent the Plan with respect to the Covered Transactions that are the subject of this exemption;

(k) Neither the Independent Fiduciary, nor any parties related to the Independent Fiduciary, have received any compensation or entered into any financial or compensation arrangements with Midlands or any parties related to Midlands;

(l) The Plan pays no interest in connection with the Restorative Payment;

(m) No Plan assets are pledged to secure the Restorative Payment;

(n) The Covered Transactions do not involve any risk of loss to either the Plan or its participants and beneficiaries;

(o) The Plan has no liability for the Restorative Payment, even in the event that the amount recovered by

Midlands with respect to the Assigned Interests is less than \$8,292,189;

(p) The Plan does not incur any expenses, commissions or transaction costs in connection with the Covered Transactions and this exemption;

(q) Midlands may not receive or retain any proceeds from the Lawsuits other than from the Assigned Interests;

(r) All terms of the Covered Transactions are and will remain at least as favorable to the Plan as the terms and conditions the Plan could obtain in a similar transaction negotiated at arm's-length with unrelated third parties; and

(s) All of the material facts and representations set forth in the Summary of Facts and Representation are true and accurate, at all times.

*Effective Date:* This exemption is effective as of December 18, 2018.

*For Further Information:* Contact Mr. Joseph Brennan of the Department, telephone (202) 693-8456. (This is not a toll-free number.)



**DISH Network Corporation 401(k) Plan and the EchoStar  
401(k) Plan (collectively, the Plans)  
Located in Englewood, CO  
[Prohibited Transaction Exemption 2023-12;  
Exemption Application No. D-12012]**

**Exemption**

On March 9, 2022, the Department published a notice of proposed exemption in the *Federal Register* at 87 FR 13320, regarding the acquisition and holding by the DISH Network Corporation 401(k) Plan (the DISH Plan) and the EchoStar 401(k) Plan (the EchoStar Plan) of subscription rights (the Rights) that were issued during the period November 26-29, 2019, by the DISH Network Corporation (DISH or the Applicant), a party in interest with respect to the Plans.<sup>37</sup>

Based on the record, the Department has determined to grant the proposed exemption. This exemption provides only the relief specified herein. It provides no relief from violations of any law other than the prohibited transaction provisions of ERISA, as expressly stated herein.

The Department makes the requisite findings under ERISA Section 408(a) based on the Applicant's adherence to all of the conditions of the exemption. Accordingly, affected parties should be aware that the conditions

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<sup>37</sup> For purposes of this exemption, references to the provisions of Title I of ERISA, unless otherwise specified, should be read to refer as well to the corresponding provisions of Code Section 4975.

incorporated in this exemption are, taken individually and as a whole, necessary for the Department to grant the relief requested by the Applicant. Absent these or similar conditions, the Department would not have granted this exemption.

#### **BACKGROUND**

As discussed in greater detail in the proposed exemption, on November 7, 2019, DISH announced its intent to conduct a rights offering (the Offering) for general corporate purposes, including investments in DISH's wireless business. The DISH Chairman and controlling shareholder is Charles W. Ergen.

Mr. Ergen also beneficially owns more than 50% of the total combined voting power of EchoStar Corporation (EchoStar), a global provider of satellite communications solutions.

Under the Offering, all holders of record of DISH's Class A (the Class A Stock) and DISH's Class B common stock (the Class B Stock), or collectively, the "DISH Stock"), and outstanding convertible notes automatically received certain rights (the Rights), at no charge. Among the holders of the DISH Stock were the DISH Plan and the EchoStar Plan, which are sponsored by DISH and EchoStar, respectively.

Under the terms of the Offering, each holder received one Right for every 18.475 shares of DISH Class A or B

Common Stock, or a Class A Common Stock equivalent (as applicable). Fractional Rights were not issued. A total of 29,834,992 Rights to purchase 29,834,992 DISH Class A Common Stock were issued in the Offering. Each Right entitled the holder to purchase one share of DISH Class A Common Stock for \$33.52 per whole share of Class A Common Stock.

The DISH Plan received 180,084 Rights and the EchoStar Plan received 9,073 rights in connection with the Offering. The Applicant represents that Newport Trust Company (Newport), a qualified independent fiduciary acting solely in the interest of the Plans' participants, made all decisions regarding the holding and disposition of the Rights by each Plan in accordance with the Plans' provisions.

The Applicant requested an exemption to permit the acquisition and holding by the Plans of the Rights that were issued by DISH, a party in interest with respect to the Plans, from November 26 through November 29, 2019. An exemption is necessary because the acquisition and holding of the Rights by the Plans is prohibited under ERISA and the Code.

On March 9, 2022, the Department published a notice of proposed exemption in the *Federal Register* at 87 FR 13320 that would permit the Plans' acquisition and holding of the Rights. The exemption requires Newport to protect and

promote the interests of the Plans' participants in the transactions. The exemption's protective conditions include a requirement that Newport represent the Plans' interests for all purposes with respect to the acquisition and holding of the Rights, and that no brokerage fees, commissions, subscription fees, or other charges were paid by the Plans with respect to the acquisition and holding of the Rights. In addition, Newport's responsibilities included determining whether and when to exercise or sell each Right held by the Plans.

As discussed below, with regard to this exemption, the Department finds that the favorable terms of the acquisition and holding of the Rights by the Plans, combined with the protective conditions included therein, are appropriately protective and in the interest of the Plans and their participants to support the granting of this exemption.

#### **COMMENTS RECEIVED REGARDING PROPOSED EXEMPTION**

In the proposed exemption, the Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the proposed exemption by April 25, 2022. During the comment period, the Department received one written comment from the Applicant, which requested several clarifications to the proposed exemption in the areas discussed below. The Department also received 12 comments from Plan participants (eight in

writing and four by phone) regarding whether the exemption would affect their benefits, and in response, the Department explained the proposed exemption to each commenter.

### **Applicant's Comments**

#### **1. No ERISA Section 406(b) Exemptive Relief**

The Applicant notes that the proposed exemption does not include the same scope of exemptive relief as prior rights offering exemptions. While some prior exemptions involving rights offerings provide relief from ERISA Sections 406(b)(1) and 406(b)(2),<sup>38</sup> this exemption does not. The Applicant requests clarification that exemptive relief from Section 406(b)(1) and (2) is not necessary. Alternatively, the Applicant requests that this exemption provide relief from ERISA Sections 406(b)(1) and (2).

**Department's Response:** The Department understands the following based on the Applicant's representations:

- DISH conducted the Rights Offering for its own general corporate purposes;
- All holders of record of DISH's Class A and B Common Stock received the Rights automatically at no charge;
- As required by this exemption, all decisions regarding

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<sup>38</sup> ERISA Section 406(b)(1) prohibits a plan fiduciary from dealing with the assets of a plan in his own interest or own account. ERISA Section 406(b)(2) prohibits a plan fiduciary in his individual or in any other capacity from acting in any transaction involving the plan on behalf of a party, or representing a party whose interests are adverse to the interests of the plan or the interests its participants or beneficiaries of the plan.

the holding and disposition of the Rights by each Plan were made in accordance with the Plan provisions by a qualified independent fiduciary acting solely in the interest of Plan participants.

Based on these representations, the Department has determined that ERISA Section 406(b)(1) or (2) is not implicated with respect to the transactions covered herein. Accordingly, any act of self-dealing or conflict of interest by a Plan fiduciary is not covered by this exemption.

## 2. Rights Described as Issued to Individually-Directed Participant Accounts

Section I of the proposed exemption describes the covered transactions as including the issuance of the Rights "to the individually-directed accounts of participants" in the Plans. The Applicant states it would be more accurate to state that the Rights were issued to the Plans. The Applicant also notes that for both of the DISH Network Corporation 401(k) Plan and the EchoStar Corporation 401(k) Plan, the proceeds from the sale of rights were allocated pro rata to the plan accounts of participants invested in DISH Stock, based on their plan account holdings on the November 17, 2019 record date of the rights offering.

**Department's Response:** The Department has revised Section I of the exemption to reflect the Applicant's requested

change that the Rights were issued to the Plans rather than to the participants' accounts in the Plans.

3. Proposed Exemption Preamble States that DISH and EchoStar Participants Were Treated the Same

The Applicant notes that preamble to the proposed exemption states that "[t]he acquisition and holding of the Rights occurred as a result of the Rights Offering, which was approved by the DISH Board of Directors, in which all shareholders of DISH and EchoStar, including their Plans, were treated exactly the same ..." [emphasis added]. The Applicant also notes that ownership of shares of EchoStar Corporation stock did not provide any entitlement to the Rights.

**Department's Response:** The Department accepts this clarification to the proposed exemption preamble.

Accordingly, after considering the entire record developed in connection with the Applicant's exemption application, the Department has determined to grant the exemption described below. The Department has also added clarifying language to certain conditions of the exemption.

The complete application file (D-12012) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N-1515, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. For a more complete statement of

the facts and representations supporting the Department's decision to grant this exemption, refer to the proposed exemption.<sup>39</sup>

## **EXEMPTION**

### **SECTION I. Covered Transactions**

The restrictions of ERISA Sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A), and Code Sections 4975(c)(1)(A) and (E), by reason of Code Section 4975(c)(1), will not apply to the past acquisition and holding by the DISH Network Corporation 401(k) Plan (the DISH Plan) and the EchoStar 401(k) Plan (the EchoStar Plan; collectively, the Plans) of certain subscription rights (the Rights) that were issued by the DISH Network Corporation (DISH or the Applicant) to Plans during a rights offering (the Rights Offering) that occurred from November 26 through November 29, 2019, if the conditions described in Section II below have been met.

### **Section II. Conditions**

(a) The Plans acquired the Rights as a result of an independent act of DISH as a corporate entity without any action by the Plans;

(b) The acquisition and holding of the Rights occurred as a result of a rights offering approved by the DISH board

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<sup>39</sup> 87 FR 13320 (3/9/2022).



of directors that treated all DISH shareholders the same, including the Plans;

(c) The acquisition of the Rights by the Plans occurred on the same terms made available to other eligible holders of DISH Stock and convertible notes, and the Plans received the same proportionate number of Rights as such other eligible holders;

(d) The Plans did not pay any fees or commission in connection with the acquisition or holding of the Rights. The Plans paid commissions and SEC fees to third parties solely in connection with the sale of the Rights;

(e) All decisions regarding the holding and disposition of the Rights by the Plans were made by Newport Trust Company (Newport), acting prudently and solely in the interest of the participants of the Plans, in accordance with the provisions of the Plans as the qualified independent fiduciary (the Independent Fiduciary);

(f) As the Independent Fiduciary, Newport:

(1) Has not been indemnified, in whole or in part, for negligence of any kind or for any violation of state or federal law in performing its duties and responsibilities to the Plans under the terms of this exemption, and there is no cap or limitation on its liability for negligence of any kind arising from the performance of its duties as the Plans' Independent Fiduciary;

(2) Has not entered into any agreement or instrument that violates ERISA Section 410 or the Department's regulations at 29 CFR 2509.75-4 by purporting to relieve Newport from responsibility or liability for any responsibility, obligation or duty imposed on it under Part 1 of Title I of ERISA; and

(3) Has acknowledged that there is no instrument or contractual arrangement that purports to waive or release it from liability for any violation of state or federal law.

*Effective Date:* This exemption is effective from November 26, 2019, the date the Plans received the Rights, until November 29, 2019, the last date the Rights were sold by the Plans on the NASDAQ Global Select Market.

*For Further Information:* Contact Mrs. Blessed Chuksorji-Keefe of the Department at (202) 693-8567. (This is not a toll-free number.)

## **GENERAL INFORMATION**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

**George Christopher Cosby,**

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